UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SHEFFIELD BARBERS, LLC,	
and,	**Cases 28-CA-199308**
	28-CA-205735
NELLIS BARBERS ASSOCIATION,	**28-CA-210447**
and,	**Case 28-CA-209734**
UNCHONG THROWER, an Individual.	

RESPONDENT'S REPLY TO GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

COMES NOW Respondent Sheffield Barbers, LLC ("Sheffield" or "Respondent"), by and through undersigned counsel, and for its Reply to General Counsel's Brief to the Administrative Law Judge ("GC Brief"), states as follows:

I. Respondent's Witnesses Should Be Credited Over General Counsel's Witnesses.

A. General Counsel's Witnesses Lack Credibility On Multiple Points.

General Counsel broadly asserts its witnesses are more credible than Sheffield's every time their testimony conflicts. (GC Brief, p. 11). General Counsel ignores its own witnesses' lack of credibility on multiple issues. The record evidence does not support General Counsel's assertion that each of its witnesses testified that Bays instructed them "to raise their hands if they wanted to work for Respondent and that it was only after the employees raised their hands to accept the offer of employment that their rate of pay was revealed." (GC Brief, p. 12). Barb Dyson ("Dyson"), the president of Nellis Barbers Association ("NBA"), testified that "[t]he 33 percent was brought up when we were asked if we wanted the job." (Tr. 356:25-357:1). Dyson stated she was "not certain" if the commission percentage was stated "before or after or in between when the sisters were introduced." (Tr. 359:20-23).

General Counsel acknowledges that Kim "did not understand exactly what was said…" during the conversation between Thrower and Monroe on November 10. (GC Brief, p. 12). General Counsel understates Kim's lack of knowledge regarding this conversation. Kim testified that "[Thrower] spoke with the manager in English. And because my English isn't so good, so I cannot say exactly that's how the conversation went. But what I remember about the conversation is that I thought that she was asking if she was going to get paid." (Tr. 146:3-5). Kim then reiterated that "[t]hey spoke in English. I cannot say exactly that's what the conversation was. I'm just going by how I understood how the conversation went. Again, I'm not sure what the conversation was exactly about." (Tr. 146:10-13). Kim clearly could not know if Thrower and Monroe were discussing pay on November 10. Kim's testimony does not corroborate Thrower's version of the conversation.

General Counsel's Exhibit 4 (hereinafter "GC-4") does not corroborate Carpenter's testimony that she allegedly overheard Deardeuff say "Respondent's labor board was better than the labor board on which NBA was relying…." (GC Brief, p. 13). Carpenter testified she overheard Deardeuff say "her labor board is better than our labor board." (Tr. 289:1-6). GC- 4 consists of bargaining session notes from November 17, 2017. It does not corroborate Carpenter's statement. (*See* GC- 4). Instead, the notes recount that "Sheffield clarified that it had filed an Answer to the NLRB Charge and Complaint, including that the NLRB lacked jurisdiction to assess back wages under the jurisdiction of the Department of Labor." (GC- 4, p. 1). Sheffield said nothing about its labor board being "better" than NBA's labor board, and GC- 4 in no way corroborates Carpenter's testimony.

B. Deardeuff Testified Truthfully At The Hearing.

General Counsel selectively quotes Deardeuff's testimony in an apparent attempt to imply

that she committed perjury. (GC Brief, p. 13). The exchange that General Counsel references occurred in the context of Deardeuff's testimony regarding GC- 8. (Tr. 66-69). Deardeuff testified her statement in GC- 8 that "the barbers were offered the jobs in this early May 2017 meeting" was "not accurate." (Tr. 67:12-16). Deardeuff reiterated that there are "some things about this (*i.e.*, GC- 8) that are not accurate" while other things in GC- 8 are accurate. (Tr. 67:19-23). Deardeuff agreed with General Counsel that her statements in GC- 8 were made under penalty of perjury. (Tr. 66:23-67:1, 67:25-68:1). General Counsel then admitted GC- 8 to impeach Deardeuff with a prior inconsistent statement. (Tr. 68:2-11).

The following exchange then occurred:

> Judge Etchingham: And I'd admonish the witness to understand that the penalty of perjury is an important—
>
> Deardeuff: I do understand that, Your Honor. But I have a few issues with that, and I'm just going to leave it at that at this time.
>
> Judge Etchingham: All right.
>
> Deardeuff: I'm sorry, but—
>
> Judge Etchingham: Just I'd encourage you to tell the truth here today.
>
> Deardeuff: I swear I'm telling the truth, the whole truth, and nothingn but the truth.
>
> Judge Etchingham: Okay.
>
> Deardeauff: Just some things go misconstrued there by—in that one by me. I should have read it closer. It's my fault for not reading it closer.

(Tr. 68:25-69:14).

The full exchange, which General Counsel ignores, clearly shows Deardeuff testified truthfully at the hearing. When Deardeuff said, "I have a few issues with that," she referred to GC- 8, not the penalty of perjury. (Tr. 68:25-69:4). The record evidence in no way supports General Counsel's implication that Deardeuff was indifferent to her obligation to testify truthfully

at the hearing. Moreover, the inaccuracy in GC- 8 that Deardeuff referred to was the date of the meeting. (Tr. 67:12-15). This is not a material fact. There is no evidence Deardeuff lied or committed perjury in her statement contained in GC- 8.

General Counsel alleges Deardeuff and Fiori "contradicted themselves" because Deardeuff did not document bullying by Thrower but Fiori testified she wrote a letter to Deardeuff. (GC Brief, p. 14). This is not a contradiction. Deardeuff did not document bullying by Thrower. Fiori did. The witnesses did not contradict themselves. The record evidence shows that Deardeuff testified truthfully at the hearing and this Court should find her testimony credible.

C. Dinger Testified Truthfully At The Hearing.

General Counsel's implication that Dinger was not truthful at the hearing because she "was a former employee who testified in Respondent's favor after getting a free cross-country trip to Las Vegas, Nevada in the winter" is meritless. (GC Brief, p. 14). Dinger acknowledged Respondent paid for her airline ticket and lodging so she could appear in Las Vegas to testify. (Tr. 533:15-534:3). Dinger took the same oath as every other witness. (Tr. 524:1-4). Nothing in her testimony or the record evidence supports General Counsel's claim that Dinger lied or was willing to lie because Sheffield paid for her plane ticket and lodging. This Court should disregard General Counsel's meritless implication and find Dinger's testimony credible.

II. No Adverse Inference Should Be Drawn From The Fact That Bays And Michels Did Not Testify.

General Counsel asks the Administrative Law Judge to draw an adverse inference against Respondent and assume Michels and Bays would have corroborated the testimony of General Counsel's witnesses regarding the job fair on April 28 and the April 29 meeting. (GC Brief, p. 15). "A party can take advantage of the 'missing witness' rule only when 'the missing witness was peculiarly in the power of the other party to produce.'" *Advocate South Suburban Hosp. v.*

N.L.R.B., 468 F.3d 1038, 1049 (7th Cir. 2006) (quoting *J.C. Penney Co. v. NLRB*, 123 F.3d 988, 996 n. 2 (7th Cir.1997). The Court noted the NLRB's application of the "missing witness" rule in *International Automated Machines* to situations where the missing witness was equally available to be called by both parties is "irrational." *Advocate South Suburban Hosp.*, 468 F.3d at 1049, n. 8. Moreover, in *International Automated Machines, Inc.*, the NLRB "recognize[d] that an adverse interest is unwarranted when both parties could have confidence in an available witness's objectivity." *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987).

Here, there is no evidence that General Counsel could not call Michels or Bays to testify. As General Counsel notes, Michels attended the hearing. (GC Brief, p. 15, fn. 10). Bays did not attend, but nothing prevented General Counsel from subpoenaing her to appear. Notably, General Counsel does not claim it could not have confidence in either witness's objectivity. General Counsel also fails to explain why Bays, who was terminated from Sheffield, may reasonably be assumed to be favorably disposed to Sheffield. General Counsel has not established that the missing witness doctrine applies. The Administrative Law Judge should decline to draw the adverse inference requested by General Counsel.

III. Respondent Did Not Violate 8(a)(1).

A. Deardeuff Did Not Surveil Respondent's Employees.

General Counsel claims Deardeuff told Dyson, Carpenter, and Browning to "to find out what the barbers were talking about and report back." (GC Brief, p. 16). General Counsel asserts this lone alleged comment means Deardeuff "attempted to turn the three barbers into informants" and "engag[ed] in surveillance." (GC Brief, p. 17). This is false. Carpenter testified Deardeuff and Michels, on a single occasion, "told…the three of us to go to the barbershop and go see what they were talking about, to come back to tell them." (Tr. 280:22-24). As a threshold matter,

Deardeuff did nto make this comment. She testified she told Dyson, Carpenter, and Browning "we've got to go, we've got to be out of here by 8 o'clock, the doors are being locked, so you guys need to go get them (*i.e.*, the other barbers) and let's go." (Tr. 71:2-6). Deardeuff explained that AAFES requires Sheffield to be out of the building by a certain time so she sent Dyson, Carpenter, and Browning to get the other barbers and exit the premises on time. (Tr. 71:20-72:2).

Assuming *arguendo* Deardeuff made this comment (she did not), it does not establish that she engaged in surveillance. Respondent did not follow employees or observe them for an extended period of time. *See, e.g.*, *Reno Hilton*, 320 NLRB 197, 197 fn.4 (1995); *Parsippany Hotel Management Co.*, 319 NLRB 114, 126 (1995). The three barbers did not "report back" to Deardeuff. (Tr. 281:2-3). No evidence or testimony indicates the barbers had the impression that Sheffield was watching or spying on their union activities. *See Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-40 (2000). No one testified that he or she believed Deardeuff was sending a message that she would watch the barbers' activities in the future. Respondent did not engage in surveillance.

B. Respondent Did Not Make Statements About The Futility of Collective Bargaining.

General Counsel argues Sheffield made various statements that constitute threats of futility. (GC Brief, pp. 17-27). General Counsel cites prior NLRB decisions defining a threat of futility. (GC Brief, p. 17). None of Respondent's statements identified by General Counsel constitute a threat of futility. Instead, the evidence shows Respondent was announcing its intent to set initial terms and that it was not holding out that it would adhere to the old CBA.

Deardeuff's statement that the CBA was "fake" and Bays telling Dyson to "shut up" do not constitute a threat of futility. General Counsel identifies only a single instance in which Deardeuff

made this comment in front of the barbers. (GC Brief, p. 6; Tr. 283:4-12).[1] General Counsel fails to explain how Deardeuff's single statement about an old CBA with a different employer shows that bargaining with Sheffield was futile. General Counsel offers only speculation that barbers might have concluded that there was no point in bargaining with Sheffield. (GC Brief, p. 18). General Counsel's argument regarding Dyson being told to "shut up" is similarly deficient. No record evidence shows Sheffield intended to convey to the barbers that collective bargaining was futile. The barbers did not conclude that bargaining was futile, as they continued to bargain with Sheffield over the ensuing months. *See* Respondent's FFCL, Sec. I(F).

Deardeuff did not say Sheffield's board is better than NBA's board. (GC Brief, p. 19). As discussed earlier, Deardeuff's statement addressed Sheffield's response to the complaint. *See* Sec. 1(A), *supra*. None of these statements constitute a threat of futility. Sheffield did not say, for example, it would take years for the NBA to get a contract, did not threaten anyone with job loss, and did not say a contract would never be obtained. *See Durham School Services, L.P.*, 364 NLRB No. 107 (2016); *Outboard Marine Corp.*, 307 NLRB 1333 (1992). The record evidence shows Sheffield was merely announcing it intended to set initial terms and was not adhering to the old CBA. *See* Respondent's FFCL, Sec. I(B). General Counsel did not meet its burden on this point and the Administrative Law Judge should find Respondent did not make statements constituting threats of futility.

C. Discipline and Discharge of Thrower.

General Counsel argues Thrower engaged in two separate instances of protected activity in the days preceding her termination. (GC Brief, p. 23). General Counsel fails to establish that Thrower was engaged in protected activity. No record evidence establishes Thrower sought to

[1] Deardeuff's testimony at the hearing that the CBA was fake is irrelevant as it was not made to the barbers and thus could not be a threat of futility.

initiate group action or bring a truly group complaint to management's attention. On November 9, Thrower complained that Sheffield hired a manager and instituted a policy. While other employees were present, Thrower did not attempt to get the other barbers to join her complaint. On November 10, Thrower complained about a one-time request for her to stay late. Thrower did not engage in protected activity.

Sheffield had no hostility to Thrower's alleged protected activity. No record evidence establishes that Sheffield was hostile to Thrower as a result of her two complaints. Instead, General Counsel offers only speculation that Sheffield "was anxious to get rid of an agitator like Thrower…" (GC Brief, p. 23). This is insufficient to meet General Counsel's burden, as it must prove by a preponderance of the evidence that Sheffield's hostility to Thrower's protected activity contributed to Sheffield's decision to terminate her employment. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

Assuming *arguendo* Sheffield was hostile to Thrower, General Counsel did not prove Sheffield's alleged hostility contributed to Sheffield's decision to terminate her employment. Instead, the record evidence establishes Thrower was terminated for cause. *See* Respondent's FFCL, Sec. II. Kim testified Thrower got angry with her and shouted at her. (Tr. 146). Kim was afraid of Thrower and uncomfortable with her because of Thrower's temper. (Tr. 157). Deardeuff spoke to Kim about this. (Tr. 99). Thrower belittled and mocked Monroe. (Tr. 241). As a result, Deardeuff terminated Thrower for insubordination and bullying. (Tr. 99; GC- 12 and 13).[2] Sheffield successfully established that it would have terminated Thrower even in the absence of her November 9 and November 10 complaints.

[2] General Counsel asserts this was the only time Deardeuff terminated an employee for bullying. (GC Brief, p. 25). This is false. Deardeuff clearly testified she had previously terminated employees for bullying, harassment, and intimidation. (Tr. 90:20).

E. Monroe Did Not Promulgate Rules on November 14.

Monroe did not promulgate rules in response to Thrower's conduct. (GC Brief, p. 26). The record evidence shows Monroe posted these definitions at Thrower's request. Thrower did not understand the meanings of insubordination, bullying, gossip, or disrespect due to cultural differences. (Tr. 254:16-18). Thrower asked Monroe to define—and post definitions of—the terms for her and other employees. (Tr. 254:20-24; 105:1-13). Monroe did not create a new policy. Instead, she posted Sheffield's existing policy. (Tr. 255:20-256:2). General Counsel failed to establish that Respondent promulgated rules in response to Thrower's alleged protected activity.

IV. Respondent Did Not Violate 8(a)(5).

A. Sheffield Is Not A Perfectly Clear Successor.

General Counsel asserts there is "little doubt that Respondent…led the barbers to believe that it was hiring them under essentially unchanged terms and conditions of employment." (GC Brief, p. 29). "[A] new employer need not produce an itemized list of changes to employment terms." *Create Vision Resources, LLC v. N.L.R.B.*, 872 F.3d 274, 289 (5th Cir. 2017). Employees only need to have notice that the new employer intended to institute new terms of employment. *Id*.

The record evidence shows Respondent notified the barbers it was hiring them under new terms and conditions of employment. *See* Respondent's FFCL, Sec. I(A)-(B). Sheffield clearly announced its intent to establish new working conditions prior to inviting the barbers to accept employment. (*Id*.). As General Counsel acknowledges, Sheffield announced in writing a "change to existing terms and conditions of employment which were governed by Respondent's CBA with GME" when Sheffield announced the barbers would have "to provide their own vacuum cleaners." (GC Brief, p. 29). Respondent is not a perfectly clear successor and did not violate Section 8(a)(5).

B. Sheffield Did Not Make Unilateral Changes.

General Counsel claims Respondent unilaterally changed the terms and conditions of its barbers' employment. (GC Brief, p. 33). This is false. Sheffield set initial terms once it learned the NBA existed as a result of Dyson's complaint. *See* Respondent's FFCL, Sec. I(C)-(G). Dyson admitted the "33% [commission rate] was brought up when we were asked if we wanted the job." (Tr. 336-37). She chose to work for Sheffield knowing of the 33% rate. (Tr. 385). Fiori testified she was not an employee when she raised her hand at the job fair. (Tr. 542).

Sheffield did not begin operations at Nellis until May 1, 2017 and was not contacted regarding bargaining until after Dyson filed her unfair labor practice charge on May 22, 2017. Sheffield did not tell or mislead the existing employees they would be hired or that new hires would work under identical terms and conditions. (GC- 5, 6). Dyson and the other barbers did not know what the pay rate would be at the time of the job fair and considered not working for Sheffield after the job fair, meaning they did not expect the same pay. (Tr. 332, 335). The record evidence establishes that Sheffield did not unilaterally change the barbers' commission rate and did not violate Section 8(a)(5).

CONCLUSION

The Board should find General Counsel did not meet its burden to establish violations of Sections (1) and (5) of Section 8 of the NLRA. Respondent respectfully requests dismissal of the consolidated complaint, and for such other and further relief as this Honorable Board deems just and appropriate under the circumstances.

Respectfully Submitted,

By: */s/ Kevin J. Dolley*

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the following on March 30, 2018 via electronic mail:

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